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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-785

FRANK J. MANTA, *et al.*,
Petitioners,

v.

NICHOLAS J. P. TRYFOROS, BEBE SPANOS IKARIS and VASILLIOS G. SPANOS,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENTS' MEMORANDUM IN OPPOSITION

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December 31, 1975

ABE DUPLICATORS, INC.—1732 Eye Street, N.W.—Washington, D.C.—298-8837

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The Petition for Certiorari is devoid of any important question warranting review by this Court. This is a classic instance of a case that is entirely factual in nature, and the resolution of the factual matters is of significance only to the immediate parties to the litigation. There is no true conflict of decision on any question presented, and none is alleged other than "in principal." And, as to the

sixth question presented, which arises out of a separate portion of a divisible judgment as to which rehearing was not sought below, the Petition is plainly out of time.

1. The service of process questions

The Seventh Circuit correctly held that the record in this case shows that proper service under Civil Rule 4(d)(3) was never effected on Icarian, the indispensable party to this stockholders' derivative action. See Pet. App. 33. All that the Petition here seeks is to have that factual determination reviewed and reversed, to wit:

A. The Petition (p. 13) seeks to convert this factual determination into a problem as to the proper construction of Rule 4(d)(3). It does so by eliding the Marshal's return to indicate that service was made on Icarian by leaving the papers with Mrs. Barbara Manta ". . . agent of the . . . corporation," thus leading to the erroneous argument that the Seventh Circuit ignored the return and construed the Rule in an improper manner. The complete answer to that contention is found in the Marshal's return itself, the essential part of which can be reproduced as follows:

I hereby certify and return that I served the annexed

SUMMONS & COMPLAINT on the therein-named
(Writ)

ICARIAN DEVELOPMENT
(Individual, company, corporation, etc.)

by handing to and leaving a true and correct copy thereof with

MRS BARBARA MANTA
(Individual or agent of company, corporation, etc.)

The printed words under Mrs. Manta's name required that the Marshal specify in his handwriting if she had been served as an agent of Icarian; but he failed to do so. And there was no indication elsewhere in the record that she had any connection with Icarian other than being the wife of its then president.[1] On such a record, the Seventh Circuit was fully justified in concluding that the service on Icarina was faulty since "Service on the wife of the president of the corporation does not constitute effective service under Rule 4(d)(3) . . ." Pet. App. 33.

B. Equally factual in nature is the contention in the Petition (pp. 14-15) that the Marshal's return, having "recited service" on Icarian, "imports verity" that could be overcome only by strong impeaching evidence. A reading of the entire return belies that factual assertion that it properly "recited service" on Icarian.

C. The assertion in the Petition (p. 15) that Petitioners were denied a due process evidentiary hearing on the sufficiency of service on Icarian is another factual claim that is undermined by the voluminous record. Suffice it to say that the service issue was first raised by Petitioners themselves in the final pre-trial order, and the

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[1] Petitioners concede that Mrs. Manta was never an officer or director of Icarian. See Petition, p. 4. In their petition for rehearing below, filed more than 7 years after the defective service, Petitioners sought to introduce "new" evidence, not in the record, that Mrs. Manta had accepted service of the papers at the request of her ill husband and thus was a momentary agent of Icarian. The Respondents moved to strike the introduction of such evidence, and the Seventh Circuit denied the rehearing without comment.

issue was repeatedly brought to the District Court's attention by the Respondents herein. In fact, the Petitioners did take a due process advantage of one of these objections by the Respondents by submitting the above-mentioned Marshal's return to the District Court as "proof" that Icarian had been properly served, which led to the District Court's conclusion that all parties had been properly served. The due process assertion now made in the Petition is but a factual phantom.[2]

2. The stockholder status questions

Several questions are raised in the Petition concerning the status of the respondent V. G. Spanos as an Icarian stockholder, with standing to protest the dismissal order "with prejudice" to Icarian's claims. But these questions are totally factual in nature, and were properly resolved in the careful opinion of the Seventh Circuit. Pet. App. 29-32. Nothing in the Petition itself (see pp. 15-16) even attempts to raise these questions to the level of legal issues of national importance.

3. The attorneys' fee question

The 6th Question Presented (Petition, p. 3) relates to the Seventh Circuit's ruling that attorneys' fees can be

[2] An alternative basis for the Seventh Circuit's conclusion that the service on Icarian was inadequate is found in the uncontroverted fact of record that no effort was ever made to serve Icarian with the First Amended Complaint, which was filed in October of 1970. The Petition complains only of the ruling as to the inadequate service of the original complaint in May of 1968. But it was the First Amended Complaint as to which the "with prejudice" dismissal order was made, and the failure to serve that complaint is fully dispositive of the service issue. See Wright and Miller, *Federal Practice and Procedure*, Vol. 4, p. 585 (1969).

awarded in a diversity case only if state law so allows, as this Court indicated last term in *Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240, 259, n. 31. The applicable law in this case was that of Illinois, and no Illinois statute or rule was found that would authorize an award under the instant circumstances. Two major comments about Question 6 are in order.

Timeliness. A serious question of timeliness exists as to Question 6, originating in the fact that there were three separate appeals before the Seventh Circuit that were consolidated only for purposes of briefing and argument. Only two of those appeals are here pertinent:[3]

(1) *Appeal No. 74-1591* was an appeal by respondent V. G. Spanos alone, an appeal that led to the Seventh Circuit's ruling that service on Icarian was ineffective and that the "with prejudice" aspect of the dismissal order was improper. The Seventh Circuit carefully noted that this respondent, V. G. Spanos, "has no personal stake in the fee award, but as a shareholder of Icarian does have an interest in the character of the dismissal." Pet. App. 29.

(2) *Appeal No. 74-1590* was an appeal solely by the respondents Tryforos and Ikaris. As to that appeal, the Seventh Circuit ruled that these two respondents "have standing to attack the judgment for fees but no standing to challenge the dismissal with prejudice." Pet. App. 29.

[3] The third appeal, No. 74-1676, was filed by respondent V. G. Spanos alone, protesting the District Court's striking of his notice of appeal. The Seventh Circuit reinstated that notice. Petitioners did not seek rehearing of that reinstatement, nor do they pursue the matter in the Petition filed in this Court.

The Seventh Circuit's judgment ordered that (1) the District Court's judgment be "set aside as to the award of fees," and (2) the judgment of dismissal "be modified to provide that it is without prejudice to the rights of Icarian." A copy of that judgment, which should have been but was not attached to the Petition, is appended hereto. But it is apparent that this judgment was a divisible one, composed of two parts relating to two separate appeals, Nos. 74-1590 and 74-1591. The two appeals involved different issues and different parties. The 90-day period in which to apply for certiorari obviously began to run, as to both segments, from the date of entry of the judgment – July 3, 1975 – and that period terminated on October 1, 1975. But the Petition herein, containing Question 6, was not filed until December 2, 1975, long after the time for filing such a petition, raising the attorneys' fee question, had expired.

It is true that Petitioners filed a petition for rehearing in the Seventh Circuit, which was denied on September 5, 1975. That tolled the time for filing the Petition as to those aspects of the divisible judgment as to which rehearing was sought. But the petition for rehearing limited itself to those "portions of its opinion relating to (1) the standing of V. G. Spanos to interpose objections to the order of the District Court dismissing this cause, and (2) the order of the District Court dismissing this cause with prejudice." Petition for Rehearing, p. 1. In other words, *no rehearing was sought as to that separable portion of the opinion and judgment dealing with the improper award of attorneys' fees.* The Petition, to the extent that it now raises a question as to the award of attorneys' fees, must therefore be considered out of time. See, generally, Stern and Gressman, *Supreme Court*

Practice, Secs. 6.3 and 6.4 (4th ed. 1969); and compare *F.T.C. v. Minneapolis-Honeywell Co.*, 344 U.S. 206, 211-212.

Reviewability. Quite apart from the time problem, the question as to the award of attorneys' fees does not merit review by this Court. The Seventh Circuit did no more than assess the particular circumstances of this case in light of the controlling Illinois law as to when attorneys' fees may be awarded, an assessment approved by this Court in the *Alyeska* footnote and not challenged by Petitioners. That assessment led to the conclusion that there is no Illinois law, in the form of a statute or rule, allowing a fee award in the particular circumstances of this case. All that the Petition (p. 17) seeks to do is to substitute some amorphous state "policy" for a specific state "law" and to argue that a federal court in a diversity case must follow state "policy" as to the award of attorneys' fees.[4]

[4] Petitioners seize upon the word "policy" in this Court's quotation from Moore's *Federal Practice* in footnote 31 of the *Alyeska* opinion: "[I]n an ordinary diversity case where the state *law* does not run counter to a valid federal *statute* or *rule of the court*, and usually it will not, state *law* denying the right to attorney's fees or giving a right thereto, which reflects a substantial *policy* of the state, should be followed." [Emphasis added.]

Obviously, state policy must be reflected in a particular state statute or court rule – which statute or rule is what the federal court is to apply in a diversity case. As was said in *Hall v. Cole*, 412 U.S. 1, 4, the traditional American rule disfavors the allowance of attorneys' fees in the absence of a specific "statutory or contractual authorization." In this case, neither the Seventh Circuit nor the Petitioners could discover any specific Illinois statute or rule allowing attorneys' fees in the instant circumstances.

Significantly, the Petition points to no Illinois statute or rule that would permit the award of fees in this case. There obviously is none.

Further argument is unnecessary to demonstrate the frivolity of that contention.

CONCLUSION

For these various reasons, the Petition for Certiorari should be denied.

Respectfully submitted,

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APPENDIX

Opinion by Judge Stevens

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

July 3, 1975
Before

Hon. WILBUR F. PELL, JR., Circuit Judge
Hon. JOHN PAUL STEVENS, Circuit Judge
Hon. WILLIAM E. DOYLE, Circuit Judge

NICHOLAS J. P. TRYFOROS and BEBE SPANOS IKARIS, *Plaintiffs-Appellants,* *and* VASILLIOS G. SPANOS, *Appellant,*	)	Appeal from the United States District Court for the Northern District of Illinois Eastern Division
No. 74-1590, 74-1591 vs. 74-1676	)	No. 68 C 656 Edwin A. Robson, Judge.
ICARIAN DEVELOPMENT COMPANY, S.A., et al., *Defendants-Appellees.*	)	

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, set aside as to the award of fees.

The judgment of dismissal entered on March 27, 1974, as amended on April 10, 1974, must be modified to provide that it is without prejudice to the rights of Icarian, and to eliminate the award of fees.

IT IS FURTHER ORDERED that the appellants be awarded their costs in these appeals.